Supreme Court, U.S.
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No. 97-2040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GRINNELL CORPORATION,
Petitioner,
v.
ROAD SPRINKLER FITTERS LOCAL UNION NO. 669; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The opinions below, the basis of this Court's jurisdiction, and the statutory provisions involved are set out at page 1 of the petition for a writ of *certiorari*.

STATEMENT OF THE CASE

The Fourth Circuit—Circuit Judges Luttig and Motz and District Judge James P. Jones, by designation—in its *per curiam* decision (unpublished), affirming the District Court's summary judgment decision in all respects, succinctly states the basis of Grinnell Corporation's antitrust claims, the District Court's ruling on those claims and the Court of Appeals' ruling on Grinnell's appeal. We therefore adopt the essentials of that decision as our statement.

The Court of Appeals first set out the identity of the parties, the procedural setting of the case and the gravamen of Grinnell's antitrust claims:

> Grinnell Corporation, a designer, manufacturer, and installer of fire sprinkler systems, has for years engaged in a fiercely-contested labor dispute with the Road Sprinkler Fitters Local Union No. 669 and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. While that case was pending before the National Labor Relations Board (NLRB), Grinnell brought this action against the local and national union alleging, in a seven count complaint, various antitrust, labor law, and state tort claims.
>
> After two years of extensive discovery, the parties filed dispositive summary judgment motions. . . . [T]he district court . . . granted the defendants' motions for summary judgment on the antitrust and labor law claims and dismissed the state law claims. . . .

> Grinnell's principal contention, alleged in Count I of its complaint, is that defendants conspired with the National Fire Sprinkler Association (NFSA), a trade association to which Grinnell belongs and to which prior to September, 1993, it had assigned its collective bargaining rights, to engage in activity amounting to an illegal restraint of trade under Section 1 of the Sherman Act. *See* 15 U.S.C.A. § 1 (West 1997). Grinnell asserts that defendants and NFSA conspired to withdraw the availability of a job program known as targeting from Grinnell in order to force Grinnell to reassign its bargaining rights to NFSA. Under this program, a contractor and the local union would negotiate concessionary rate agreements as to an individual project in a particular geographical area so the contractor might be able to compete with lower-cost, nonunion contractors. Grinnell also claims that, in an effort to standardize contract terms and employment conditions within the sprinkler industry, the defendants and NFSA conspired, during the course of negotiating their collective bargaining agreement, to prevent Grinnell from obtaining more favorable collective bargaining terms. [Pet. App. 2a-4a.]

The Court of Appeals went on to note that, in granting summary judgment on these claims.

> Judge Harvey explained that "[t]he record discloses as a matter of law first that defendant Local 669 acted unilaterally in withdrawing from Grinnell the right to participate in the job targeting program and second that the Union and the NFSA did not illegally conspire during their collective bargaining to prevent Grinnell from obtaining more favorable bargaining terms." Moreover, the judge further concluded, "assum[ing] *arguendo*, that there is a dispute of material fact as to the existence of a conspiracy between the NFSA and the Union," the non-statutory labor exemption from antitrust liability shielded the alleged restraint. [Pet. App. 4a-5a.]

The Court of Appeals then concluded as follows:

> On appeal, Grinnell repeats the arguments made below, asserting that the district court ignored evidence supporting its claims. After a painstaking review of the record, as well as consideration of the briefs, relevant statutes, case law, and the oral arguments of the parties, we conclude that Judge Harvey's assessment of the evidence was accurate and his rulings correct. Accordingly, we affirm on the basis of the careful reasoning of the district court. [Pet. App. 5a-6a.]

ARGUMENT

I.

The first question petitioner Grinnell Corporation raises—"Whether the court of appeals erred in imposing a heightened proof standard for antitrust conspiracy claims at the summary judgment stage that is in direct conflict with the standards adopted by other circuits," Pet. i—is *not*, in fact, presented by this case.

The District Court's summary judgment findings rest on classic, *general* Rule 56 Fed.R.Civ.Pro. summary judgment principles and *not* on any "heightened proof standard for anitrust conspiracy claims."

Moreover, Grinnell—in appealing to the Fourth Circuit from the District Court's grant of summary judgment on Grinnell's antitrust conspiracy claims—did *not* make *any* "erroneous proof standard" challenge to the District Court's ruling, much less the "erroneous heightened proof standard for antitrust claims" contention raised in the *certiorari* petition as Question 1.

And, in any event, the Fourth Circuit's developed "proof standard[s] for antitrust conspiracy claims" belie Grinnell's contention that the Court of Appeals imposes any such "erroneous heightened proof standard."

On each of these grounds—which we now develop—Grinnell's request for review by this Court falls far short and should be denied.

(a) It is Grinnell's principal submission, in support of its *certiorari* petition, that the Fourth Circuit erred by "interpreting" the second, antitrust-law-specific portion of the summary judgment discussion in *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986)

> to mandate dismissal of antitrust conspiracy claims whenever the plaintiff's evidence at the summary judgment stage is consistent with inferences of both conspiracy and innocent conduct. Under this interpretation, *Matsushita*'s rigorous standard applies regardless of the plausibility of the plaintiff's theory or the nature of the alleged misconduct. [Pet. 12].[1]

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[1] In *Matsushita*, this Court—in discussing the propriety of the entry of summary judgment in that § 1, Sherman Act antitrust conspiracy case—first noted the following basic Rule 56 principles:

> To survive petitioners' motion for summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed. Rule Civ. Proc. 56(e); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968) . . . [T]he issue of fact must be "genuine." Fed. Rules Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See DeLuca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), *cert. denied*, 338 U.S. 943 (1950) . . . In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed. Rule Civ. Proc. 56(e) (emphasis added) . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Service, supra*, at 289. [475 U.S. at 585-587.]

Then, with specific reference to the antitrust laws, the *Matsushita* Court added the following with regard to situations in which a plaintiff, in opposing a defendant's motion for summary judgment, relies on "ambigous evidence" from which, says the plaintiff, "permissible inferences" of an "illegal conspiracy" can be drawn:

> Respondents correctly note that "[on] summary judgment the inferences to be drawn from the underlying facts . . . must be

That submission avails Grinnell nothing for the most straightforward of reasons—this case was decided on the well-settled general summary judgment principles discussed in *Matsushita*, and in a manner that pretermitted any need to apply the *Matsushita* antitrust law standard for evaluating "ambiguous evidence" regarding an "illegal conspiracy." Grinnell's effort to dress up this garden-variety undisputed fact case as one turning on some sophisticated and disputed antitrust law standard of proof is made out of whole cloth.

The District Court's careful opinion—thoroughly analyzing the "massive record" generated by the "voluminous discovery" undertaken below, Pet. 20a—makes it plain that the District Court proceeded by applying the generally applicable requirements of Rule 56(c), and without the need to reach any special antitrust law standard of proof.

On the parties' cross motions for summary judgment, the District Court properly allocated to the defendant Unions as moving parties "the burden of showing the absence of any genuine issue of material fact" and the burden of demonstrating the *"absence of evidence* to support the nonmoving party's case" in order to prevail. Pet. App. 16a, citations omitted, emphasis added. And,

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viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764. *See also Cities Service, supra*, at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. at 764. [475 U.S. at 587-588.]

the District Court, viewing the record "in the light most favorable to [Grinnell] the party opposing the motion," Pet. App. 17a, concluded that Grinnell had failed to make even "the necessary *minimal* showing . . . that the defendant may be liable." Pet. App. 17a, emphasis added.

As for Grinnell's "job targeting conspiracy" claim, the District Court first recognized the undisputed discretionary nature of the Union targeting program, which Grinnell had expressly conceded:

> The Union had always reserved to itself the right in its discretion to permit targeting by a particular contractor or to deny targeting to a particular class of contractors. There had never been an agreement between the NFSA and the Union which prohibited the Union from restricting the application of targeting to particular contractors. [Pet. App. 26a and n.8.]

With respect to the exclusion of Grinnell from the Union targeting program in November of 1993, the District Court found that the undisputed evidence established that

> [w]ith bargaining for a new contract about to commence, the Union *unilaterally* decided to extend the targeting program only to those employers who signed an Assent and Interim Agreement or who agreed to be represented by the NFSA for future bargaining. [Pet. App. 25a, emphasis added.]

In so doing the District Court relied upon the substantial affirmative and unrefuted record evidence submitted in support of the Unions' motion for summary judgment:

> According to the testimony of all Local 669 witnesses and all NFSA witnesses, the NFSA did not participate in any way in the decision to reimpose in November the conditions which had to be met by contractors if they were to participate in targeting. [Pet. App. 26a.]

Equally to the point the District Court found as follows with regard to Grinnell's "proof":

> Grinnell seeks to derive inferences from various facts of record in support of its contention that proof of an illegal conspiracy exists in this case. But these inferences are *so tenuous as to amount to no more than speculation and conjecture.* . . . They do not "fall within the range of reasonable probability" so as to create a jury issue as to plaintiff's claim that the Union conspired with the NFSA to withdraw targeting from Grinnell. [Pet. App. 26a-27a, citations omitted, emphasis added.]

As for Grinnell's alternative "conspiracy theory," alleging preclusion of independent collective bargaining, the District Court again concluded that the record evidence—including the parties' bargaining notes and the transcript and exhibits from a 22 day N.L.R.B. unfair labor practice hearing growing out of the same events—provided *no* support for "[Grinnell's] conten[tion] that Local 669 and the NFSA agreed that Grinnell would not receive a more favorable agreement than the one negotiated between these parties." Pet. App. 29a. After searching that record the District Court concluded:

> But *evidence does not exist* that any such agreement was ever reached. Although the NFSA pressed hard for inclusion of a most favored nation clause in the agreement, the demand was eventually dropped and was not included as a part of the final collective bargaining agreement reached between the Union and the NFSA. Moreover, during negotiations with Grinnell, the Union did not even insist that the terms and conditions of the Grinnell agreement be the same as those contained in the NFSA agreement.
>
> The Union at all times remained flexible in its bargaining sessions with Grinnell, and indeed, some of the wage concessions made were more favorable to Grinnell than those contained in the agreement

> reached with the NFSA. [Pet. App. 29a, emphasis added.]

Grinnell's inability to controvert the Unions' factual assertions for summary judgment purposes left the District Court with no alternative other than to dismiss the allegation:

> [*E*]*vidence* does not exist that the Union conspired during its bargaining with the NFSA to prevent Grinnell from obtaining more favorable terms than those contained in the collective bargaining agreement reached between the Union and the NFSA. [Pet. App. 27a-28a, emphasis added.]

(b) It is equally fatal to Grinnell's *certiorari* petition that Grinnell made *no* claim to the Fourth Circuit that the grant of summary judgment to the Unions and against Grinnell's antitrust conspiracy claim was in error and should be reversed because that summary judgment rested in whole or in part on an "erroneous heightened proof standard for antitrust conspiracy claims." Both in its original submissions to the Fourth Circuit and on rehearing, Grinnell's only claim was instead that the District Court had "ignored evidence supporting its claims." Pet. App. 5a; Appellant's Brief at 8-9; Petition for Rehearing at 1. Indeed, in stating the governing principles, Grinnell treated the Fourth Circuit's decisions that do turn on, and explicate, *Matsushita's* discussion of the proper antitrust-law-specific summary judgment approach to ambiguous evidence regarding an illegal conspiracy as entirely correct. Appellant's Reply Brief at 11-12.

Thus, even assuming that the "heightened proof standard" issue were somehow relevant to the decision of this case, it is far too late in the day for Grinnell to raise this issue in this Court for the first time. For the Court will not consider, as a question presented for *certiorari*, an issue that was "neither raised nor considered by the Court of Appeals." *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 147 n.2 (1970) (citations omitted). And, the "routine restatement and application of settled law" gov-

erning antitrust case summary judgments by the Fourth Circuit here, *see* Pet. App. 4a, where there was no "real contest" on the point, does *not* suffice to preserve the issue for *certiorari*. *Illinois v. Gates*, 462 U.S. 213, 222-223, (1983). *See also, e.g., Auer v. Robbins*, 519 U.S. 452, ——, 117 S.Ct. 905, 912 (1997).

(c) While we believe the foregoing is dispositive, we would be derelict if we failed to point out that Grinnell, in its need to try to create the appearance of disarray in the court of appeals law on *Matsushita's* antitrust-law-specific summary judgment approach tortures the relevant Fourth Circuit jurisprudence beyond recognition.

The most recent full Fourth Circuit statement of the governing summary judgment principles in antitrust cases is set out in *Thompson Everett, Inc. v. National Cable Advert. L.P.*, 57 F.3d 1317 (4th Cir. 1995), upon which the District Court, Pet. App. 18a-19a, and the Fourth Circuit, Pet. App. 4a, relied below. In that case, the plaintiff-appellant argued that the district court had erred in granting summary judgment to the defendant-appellee by "yielding too readily to the defendants because of a mistaken belief that such preference should be given in antitrust cases." 57 F.3d at 1322.

The Fourth Circuit, in rejecting that contention, responded by setting out the proper practice on such summary judgment motions:

> While Rule 56 is to be applied to antitrust cases no differently from how it is applied to other cases, that is not to say that the summary judgment device is not an appropriate and useful tool for resolving antitrust cases. On the contrary, because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for Rule 56 utilization. The summary judgment practice does not become disfavored simply because a case is com-

> plex. Rather, it is favored as a mechanism to secure the "just, speedy and inexpensive determination" of a case, *see* Fed.R.Civ.P. 1, when its proper use can avoid the cost of trial. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). While it is axiomatic that Rule 56 must be used carefully so as not improperly to foreclose trial on genuinely disputed, material facts, the mere existence of some disputed facts does not require that a case go to trial. The disputed facts must be material to an issue necessary for the proper resolution of the case, and the quality and quantity of the evidence offered to create a question of fact must be adequate to support a jury verdict. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Thus, if the evidence is "merely colorable" or "not significantly probative." it may not be adequate to oppose entry of summary judgment. *Id.* at 249-50. [57 F.3d at 1322-1323.]

As to the drawing of inferences from the record evidence the Court of Appeals added:

> While we have recognized generally that when considering a motion for summary judgment, the district court must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion," *Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1276, 122 L.Ed.2d 671 (1993), we hasten to add that those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture. *See Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 817 (4th Cir. 1995). Moreover, the inferences which may be drawn vary from one substantive area of the law to another. Thus, on summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that

> an illegal conspiracy has occurred without other evidence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).
>
> At bottom, the district court must determine whether the party opposing the motion for summary judgment has presented genuinely disputed facts which remain to be tried. [57 F.3d at 1323.]

The foregoing, we submit, makes it perfectly plain that, contrary to Grinnell's submission, the Fourth Circuit has not read *Matsushita* as a license to adopt a special "rigorous and restrictive" antitrust summary judgment standard. Rather, consistent with *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 541, 468-469 (1992), the Fourth Circuit recognizes that *Matsushita* "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases" and "demands only that the nonmoving party's inferences be reasonable in order to reach the jury. . ." [2]

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[2] Grinnell similarly overreads the Seventh Circuit case law. Grinnell cites *Serfecz v. Jewel Food Stores*, 67 F.3d 591 (7th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 1042 (1996) as the most recent Seventh Circuit case reading *Matsushita* as authorizing the "impos[ition of] a heightened evidentiary burden" on antitrust plaintiffs opposing summary judgment. Pet. 13-14. But *Serfecz* imposes no such burden. Rather the *Serfecz* decision, like the Fourth Circuit's *Thompson Everett* decision, gives *Matsushita* a straightforward reading consistent with basic Rule 56 principles:

> The evidence of record fails to show that, if the case were submitted to a trier of fact, there would be sufficient evidence to justify a judgment for the plaintiffs. Although, at the summary judgment stage, we must evaluate the record so as to give the nonmoving party the benefit of the doubt on all reasonable inferences that may be drawn from that record, we are not permitted to allow a case built on a metaphysical doubt to go to the jury. *Matsushita*, 475 U.S. at 586-87. Here the plaintiffs' case is built on a metaphysical doubt on a metaphysical doubt. There is simply no evidence that precludes the possibility of independent action. *Id.* at 597 n.21. In this context, the absence of that evidence deprives the plaintiffs of a reasonable

What this case comes down to in this regard, as both the District Court and Court of Appeals held—after the most careful scrutiny of the record—is that there is *no* record evidence of the alleged combination or conspiracy

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case that would support a jury verdict. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1000-01 (3d Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1691, (1995); *see Eastman Kodak*, 504 U.S. at 468-77. [67 F.3d at 602]

Indeed, while Grinnell claims that the Seventh Circuit antitrust summary judgment decisions are in "direct contrast" with those of the Third Circuit, *Serfecz* (as the foregoing quotation shows) cites with approval, and follows, the most recent Third Circuit decision in point—*Alvord-Polk, Inc. v. F. Schumacher & Co., supra*, (cited by Grinnell at Pet. 16).

Grinnell seeks to make much of the Eighth Circuit's rejection of the plaintiff argument that *Matsushita*'s antitrust-law-specific summary judgment approach "does not apply . . . [where] the conspiracy . . . allege[d] served defendants' economic interest"—on the ground that the Eighth Circuit "read[s] *Matsushita* more broadly." *Corner Pocket of Sioux Falls v. Video Lottery*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied, sub nom. Corner Pocket of Sioux Falls v. Powerhouse Technologies*, —— U.S. ——, 118 S.Ct. 1054 (1998). But this portion of *Corner Pocket* does not show that the Eighth Circuit has adopted the "heightened evidentiary burden" reading of *Matsushita* Grinnell attributes to that court. All *Corner Pocket* (and its precursors) do is hold, quite unexceptionably, that "where the objectively observable market conditions are consistent with defendant's assertions . . . that [the defendant] acted unilaterally . . . and independently . . . absent additional evidence of concerted action, the market conditions emphasized by plaintiffs do not prove that 'the inference of conspiracy is reasonable in light of the competing inference[] of independent action.'" 23 F.3d at 1112 *quoting Matsushita*, 475 U.S. at 588. That holding all but tracks *Matsushita* rather than adding to it.

Grinnell's attempt to create a circuit conflict out of *In Re Coordinated Pretrial Proceedings*, 906 F.2d 432 (9th Cir. 1990) is equally faulty. Grinnell emphasizes that the Ninth Circuit rejected the proposition that *Matsushita* "suggest[s] that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible," 906 F.2d at 438—a proposition not adopted by any court of appeals. And, Grinnel does so in order to suggest that the Ninth Circuit gives *Matsushita* a narrower scope than other circuits. Grinnell is much more reticent in

that generates any such *"reasonable . . . inferences."* And, this Court does not sit to review careful district court factfindings carefully reviewed and affirmed by a court of appeals. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1937) ("granting of the writ would not be warranted merely to review the evidence or inferences drawn from it"); *Rudolph v. U.S.*, 370 U.S. 269, 270 (1962) (dismissing writ of *certiorari*, and stating that, where the appellate court approved the district court's findings of fact, "their review [by the Court] would be of no importance save to the litigants themselves.")

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quoting the Ninth Circuit's statement of what *Matsushita* does "suggest." And, for the most obvious reason—what the Ninth Circuit said in that regard is directly in line with the rest of the court of appeals case law:

> Thus, *Matsushita* establishes that a trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct. We emphasize, however, that an antitrust defendant is not entitled to summary judgment simply by virtue of the fact that the plaintiff's inference of conspiracy would have *some* deterrent effects; the effects must be significant. As the Court stated in *Matsushita*, the concern with avoiding deterrent effects "must be balanced against the desire that illegal conspiracies be identified and punished." 475 U.S. at 594. In short, the trial court must consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, "sufficiently unambiguous" evidence that does not have these undesirable deterrent effects. *Id.*, at 597-98 & n.21. [906 F.2d at 439; *see also id.* at 440 and 447]

The sum of the matter is that taking into account the nuances created by natural differences in judicial writing styles, the courts of appeals restatements of, and elaborations on, *Matsushita* are, in their essentials, remarkably uniform. Certainly there are no differences that come anywhere close to creating a circuit conflict. Thus, Grinnell's conflict argument is doubly defective—it pertains to an issue not presented by this case and it is unsound in its own terms.

II.

As secondary grounds for the grant of its *certiorari* petition, Grinnell argues that the District Court misunderstood and misapplied the nonstatutory labor exemption to the antitrust laws as well as the substantive requirements of a *Pennington* antitrust claim.

Grinnell contends first that the District Court's determination that the nonstatutory exemption applies to the Unions' unilateral "job targeting" allocation decisions is inconsistent with the proper test for applying the exemption stated in *Mackey v. National Football League,* 543 F.2d 606, 614 (8th Cir. 1976). Pet. 20-22.

Second, Grinnell posits that, in abiding by this Court's instruction, in *Brown v. Pro Football, Inc.,* 518 U.S. 231, 245-250 (1996), not to second-guess the subjective motives of parties in collective bargaining, the District Court transgressed the principles enunciated in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). Pet. 22-25.

And, third, Grinnell claims that the District Court erred in stating the requirements of an actionable *Pennington* antitrust claim. Pet. 25-29.

Grinnell is wrong in each regard, and it follows that neither the nonstatutory exemption question raised in the *certiorari* petition nor the *Pennington* question is worthy of this Court's review.

(a) Rather than departing from the *Mackey v. National Football League* nonstatutory labor exemption test, as Grinnell claims, the District Court *expressly followed Mackey*:

> The test to be applied in a case such as this one is that recognized by several circuit courts. Under that test, the parties to an agreement restraining trade are exempt from antitrust liability if (1) the restraint primarily affects the parties to the agree-

> ment and no one else; (2) the agreement concerns wages, hours or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from *bona fide* arms-length collective bargaining. *Phoenix Elec. Co. v. National Elec. Contractors Ass'n*, 81 F.3d 858, 861 (9th Cir. 1996); *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976). [Pet. App. 32a.]

Applying that test to Grinnell's hypothetical conspiracy between the Unions and NFSA to withdraw targeting from Grinnell—*a conspiracy Grinnel was in any event unable to prove*—the District Court expressly found the three *Mackey* factors to be present. Pet. App. 32a-33a.

That Grinnell finds fault with the District Court's application of the *Mackey* test to the particular facts of this case does not establish a circuit conflict or create an issue of law for this Court's consideration. Indeed, the Eighth Circuit itself recently applied its *Mackey* test to uphold a union targeting program against antitrust claims. *See Local Union 257, Int'l Bhd. of Elec. Workers v. Sebastian Elec.*, 121 F.3d 1180, 1186 (8th Cir. 1997). And in this regard, the Eighth Circuit followed the lead of the Ninth Circuit in *Phoenix Elec. Co. v. National Elec. Contractors Ass'n, supra* (targeting program protected by nonstatutory exemption).

(b) Grinnell's claim that this Court's decisions in *Brown v. Pro Football League* and *Pennington* are somehow inconsistent and that the District Court's citation, and application, of *Brown* to a *Pennington* antitrust claim undermines the *Pennington* decision is insubstantial.

The *Brown* Court cautioned district courts sitting in antitrust cases not to second-guess the "true purpose" or "subjective motive" of a party engaged in collective bargaining. 518 U.S. at 245-250. As the District Court recognized, that caution is perfectly consistent with *Pennington's* holding that the labor exemption does not apply

when it is "clearly shown" that a union has agreed with one set of employers to impose a particular wage scale on others while recognizing that it is "beyond question" that a union may conclude a wage agreement with a multiemployer group and, as a matter of its own policy, seek the same wages from others. 381 U.S. at 663.

Thus, under *Brown* and *Pennington*, correctly read, the District Court properly rejected Grinnell's invitation to divine some hidden agenda in the collective bargaining negotiations between the Unions and NFSA, in the *absence of any evidence* suggesting such an agenda. The District Court repeatedly noted that evidence simply "does not exist" that the Unions conspired with NFSA in bargaining to deny more favorable terms to Grinnell. Pet. App. 27a, 29a, 30a.

(c) Grinnell is on no stronger ground in attacking the District Court's reliance on *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980) in defining an actionable *Pennington* anti-trust combination or conspiracy to impose terms and conditions on third party employers through collective bargaining.[3]

Smitty Baker rests on a painstaking review of the three-part decision in *Pennington* as well as the post-*Pennington* judicial authority and commentary, and on the basis of that review, concludes

> To amount to an antitrust violation the agreement must be rooted in an anti-competitive purpose, and must effect an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." [620 F.2d at 431-32.]

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[3] While we treat with Grinnell's *Pennington* claim question on its merits in text we emphasize that in the context of this case that question is entirely hypothetical. The District Court found as a fact that "evidence does *not* exist that any [Union-NFSA] agreement [to impose terms and conditions on Grinnell] was ever reached." Pet. App. 29a.

In recognizing this "predatory intent" element, *Smitty Baker* follows the lower courts' reading and application of *Pennington* on remand. *See Lewis v. Pennington*, 400 F.2d 806, 813-14 (6th Cir.), *cert. denied*, 398 U.S. 960 (1968). And as Grinnell acknowledges, "the Fifth, Sixth and Seventh Circuits have likewise held that substantive claims under *Pennington* require a showing of predatory intent to drive the competitor out of business. Pet. 26, n.8. *See, e.g., James R. Snyder Co. v. Associated Gen. Contractors of Am.*, 677 F.2d 1111, 1120 (6th Cir. 1982); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974); *Associated Milk Dealers, Inc. v. Milk Drivers Union*, 422 F.2d 546, 554 (7th Cir. 1970).

We know of no court of appeals decision to the contrary. *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421 (3d Cir. 1982)—the one case cited by Grinnell as such—is inapposite. As the Third Circuit noted in its earlier opinion in that litigation, the *Muko* case was predicated on antitrust claims *arising wholly outside of a collective bargaining relationship. See Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979).

So far as our researches and those of Grinnell show, then, the courts of appeals are in complete accord on the proper reading and application of *Pennington* to alleged antitrust combinations or conspiracies to impose terms and conditions on third party employers through collective bargaining. Accordingly, the decision below in this regard raises no question for review in this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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